In The

Supreme Court of the United States

BAYSHORE FORD TRUCK SALES, INC.,
PEACH STATE FORD TRUCK SALES, INC.,
LJL TRUCK CENTER, INC.,
VALLEY FORD TRUCK SALES, INC.,
AND HEINTZELMAN'S TRUCK CENTER, INC.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1999, Petitioners sued Ford Motor Company in U.S. District Court alleging violations of two federal statutes and making a state-law claim for breach of contract. The sole basis for federal jurisdiction was "federal question," and the state-law claim was initially retained under supplemental jurisdiction. After the federal claims had been eliminated from the case by amended pleading, and in compliance with this Court's recent *Rockwell* decision, the trial court dismissed the case for lack of subject-matter jurisdiction. However, the Eleventh Circuit reversed, finding that subject-matter jurisdiction was still present even though there were no longer any federal-question claims pending in the case. Petitioners present the following questions in this Petition:

1. Must a federal court that has original "federal question" jurisdiction and supplemental jurisdiction under 28 U.S.C. §1367 dismiss the entire case when the federal claims are eliminated from the case before trial by amendment of the complaint?

2. Is the discretion afforded a court under 28 U.S.C. §1367(c)(3) only applicable when the plaintiff's current live pleading contains a viable federal claim cognizable under 28 U.S.C. §1367(a)?

PARTIES TO THE PROCEEDINGS

Bayshore Ford Truck Sales, Inc., Petitioner
Peach State Ford Truck Sales, Inc., Petitioner
LJL Truck Center, Inc., Petitioner
Valley Ford Truck Sales, Inc., Petitioner
Heintzelman's Truck Center, Inc., Petitioner
There are no parent or publicly held companies that own 10% or more of the corporate stock of any of the Petitioners.

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Ford Motor Company, Respondent
Ford Motor Company has subsidiaries, but they are unknown to Petitioners.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Bayshore Ford Truck Sales, Inc., Heintzelman's Truck Center, Inc., LJL Truck Center, Inc., Peach State Ford Truck Sales, Inc., and Valley Ford Truck Sales, Inc., state that they are privately held corporations. There are no parent corporations or publicly held companies owning 10% or more of any Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully petition this Honorable Court for a writ of certiorari to review and correct the decision of the United States Court of Appeals for the Eleventh Circuit in *Bayshore Ford Truck Sales, Inc.*, 2008 WL 4846324 (11th Cir. 2008) (unreported decision) which reversed the decision of the United States District Court for the Northern District of Georgia dismissing the lawsuit for lack of subject-matter jurisdiction.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Bayshore Ford Truck Sales, Inc. v. Ford Motor Company*, dated November 10, 2008, is unreported but can be found at 2008 WL 4846324 and is set forth in Appendix (App.) 3-6. The unreported order of the Eleventh Circuit denying reconsideration and *en banc* review, dated January 7, 2009, is set forth in App. 31-32. The unreported memorandum opinions of the United States District Court for the Northern District of Georgia dismissing the case for lack of subject-matter jurisdiction and overruling Ford's motion for rehearing, dated January 22, 2008 and April 8, 2008, are set forth in App.

7-9 and App. 10-14, respectively. The Judgment of the Court of Appeals dated November 10, 2008 is set forth in App. 1-2. The proposed Pre-Trial Order in the District Court (excluding voluminous, irrelevant attachments) is set forth in App. 33-57. The Order dated January 19, 2000, N.D. Ga., Civil Action No. 4:99-CV-173-RLV, is set forth in App. 15-30.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 10, 2008. A petition for rehearing *en banc* was considered as a petition for reconsideration and overruled by the Eleventh Circuit on January 7, 2009 and judgment was entered on January 10, 2009.[1] Thus, Petitioner had until April 10, 2009 to file this Petition under Supreme Court Rule 13(1).

The Supreme Court has jurisdiction to review the judgment in question on writ of certiorari in accordance with 28 U.S.C. §1254(1).

[1] Under SUPREME COURT RULE 13.3, the Eleventh Circuit treats petitions for rehearing *en banc* as petitions for panel rehearing. LOCAL RULE FOR THE ELEVENTH CIRCUIT 35-5, Form of Petition: " . . . A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel."

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, Article III:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. §1331, Federal question:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1367, Supplemental jurisdiction:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such

original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

STATEMENT OF THE CASE

Introduction

Petitioners are five franchised Ford dealers. In July 1999, they sued Ford Motor Company for damages based on claims that Ford's program of discounting the price of certain trucks to dealers caused Ford to be in violation of the Robinson-Patman Act, 15 U.S.C. §13, the Dealer Day in Court Act, 15 U.S.C. §1221, and the franchise contracts between Ford and its dealers. Jurisdiction was originally founded on "federal questions" pending in the case, and the state-law breach of contract claim was

retained under supplemental jurisdiction, 28 U.S.C. §1367.[2]

As set forth in the Procedural History section below, the jurisdictional landscape of this case has changed substantially since 1999. According to the precedents of this Court, those changes dictate that the case must be dismissed for lack of subject-matter jurisdiction and the District Court properly did so.

Petitioners raise one constitutional issue and one issue of statutory construction in this petition. First, Petitioners argue that federal courts who have original jurisdiction under §1331 lose Article III subject-matter jurisdiction under the express terms of §1367(a) when there is no longer a federal claim "in the action" due to amendment of plaintiff's complaint. Second, Petitioners argue that the discretion to *retain* supplemental jurisdiction under §1367(c)(3) only applies when the plaintiff's current live pleading still contains a federal claim, and not otherwise, in accordance with *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457 (2007) and other case precedents.

Factual History

Ford Motor Company sells vehicles through a network of independent, franchised dealers. Ford

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[2] All references in this Petition to federal statutory sections are to Chapter 28, United States Code, and all references to "rules" are to the Federal Rules of Civil Procedure, unless otherwise indicated.

does business with these dealers under the terms of written franchise agreements called "Sales and Service Agreements." One relevant provision of the form franchise agreements, ¶10, requires Ford to sell products to dealers only at "published" prices and discounts (i.e., prices and discounts published to dealers in advance of the sales).

Since the early 1980's, Ford Motor Company sold medium-duty and heavy-duty trucks to dealers like Petitioners using a form of unpublished wholesale-price discount known as "Competitive Price Assistance" or "CPA." Dealers were required to use the CPA program when they purchased trucks from Ford because Ford set the initial wholesale prices of its trucks, called "Wholesale Delivered prices" or "WSD prices," at levels that were higher than the retail or "street" prices the dealers could resell the trucks for. This caused a situation where dealers had to get CPA discounts from Ford in order to pursue profitable retail sales.

According to experts in economics, Ford's CPA program allowed Ford to appropriate all or most of the consumer surplus from the dealers' retail sales. Ford did this by requiring the dealer to tell Ford its anticipated "street" price before Ford would tell the dealer the amount of unpublished CPA discount they would be given to the dealer on each sale. Ford would then set the CPA discount amount at a level that allowed the dealer to make a profit of Ford's choosing, usually between $0 and 2% of the truck's retail price. By use of the CPA program, Ford was able to misappropriate from its U.S. dealers more than $2 billion of

what would otherwise have been those dealers' profits.

Procedural History

Petitioners filed suit in July 1999 for violation of 15 U.S.C. §13 (the Robinson-Patman Act, or RPA), 15 U.S.C. §1221 et seq. (the Dealer Day in Court Act, or DDCA), and state-law breach of contract. Petitioners moved to have the case certified as a class action on behalf of all dealers in the United States, but the District Court denied the motion.

The DDCA claim was dismissed by the District Court on January 19, 2000. That decision was never appealed. On December 6, 2002, Petitioners were granted unopposed leave to file a Third Amended Complaint in which they dropped the RPA claims, leaving only the state-law breach of contract claims in their live pleading.[3]

Several years of motion practice in the District Court and appeals in the Eleventh Circuit then took

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[3] The DDCA claim is still found in the *text* of the Third Amended Complaint, but that inclusion was deemed and agreed to be a scrivener's error by the parties and by the lower court. See App. 7-8 and 11-12.

The lower courts decided the case as if the DDCA claim was not included in the Third Amended Complaint, and that is the procedural law-of-the-case for purposes of this Petition. This means the Third Amended Complaint contained only Petitioners' state-law breach of contract claim.

place concerning the remaining state-law claims. The case was set for trial on at least two occasions, but has never been tried due to the continuing motion practice and appeals that have constituted the majority of the litigation activity in the case since 2002.

In early January 2003, immediately following the filing of the Third Amended Complaint, the District Court asked counsel to prepare letter briefs regarding whether the case should be dismissed since all federal claims had been eliminated and only state-law claims remained in the action. After receiving those letter briefs (in which Petitioners argued for dismissal and in which Ford opposed it), the District Court decided, without comment or opinion, not to dismiss the case at that time.

In March 2003, Ford filed a motion for summary judgment asking the court to dismiss the lone remaining breach of contract claim. The District Court granted Ford's motion for summary judgment and dismissed the case.

As a final judgment, this ruling was appealed by Petitioners in June 2003. In 2004, the Eleventh Circuit reversed the summary judgment and remanded the case to the trial court.[4]

In July 2005, Petitioners filed a motion to dismiss the case based on the argument that the court

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[4] *Bayshore Ford Truck Sales, Inc. v. Ford Motor Company*, 380 F.3d 1331 (11th Cir. 2004).

should allow Petitioners to pursue their claims as members of a class action that had recently been certified in the Ohio Court of Common Pleas which was adjudicating the same state-law breach of contract claims as were pending in the Petitioners' federal case. The District Court denied this Motion on August 3, 2005, again without comment or opinion.[5]

On August 4, 2005, one day after denying Petitioner's motion to dismiss, the District Court entered an order enjoining further prosecution of a class action certified in *Westgate Ford Truck Sales, Inc. v. Ford Motor Company*, case no. 483526, Cuyahoga County (Ohio) Court of Common Pleas (the "*Westgate*" case). The same breach of contract claims at issue in this action pend now on behalf of all affected Ford dealers – including Petitioners – in the *Westgate* case. The *Westgate* class action is still ongoing and certification of a nation-wide class of dealers has been affirmed all the way to the Ohio Supreme Court.

Petitioners appealed the District Court's entry of the injunction. In December 2006, the Eleventh Circuit vacated the injunction, holding that the

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[5] The parties submitted a joint proposed Pre-Trial Order to the court on July 11, 2005, but probably due to the court's ongoing activity relating to the *Westgate* case, this Pre-Trial Order was never signed by the court. The Pre-Trial Order clearly shows, however, that only the state-law breach of contract claim remained pending for trial; no federal claims are mentioned because all federal claims had been removed by amended pleading. See App. 40-45.

District Court lacked legal authority to enjoin the *Westgate* case and holding that the Petitioners were "now free to [participate as class members in *Westgate*]."[6]

On April 3, 2007, immediately following remand of the case from the Eleventh Circuit, Petitioners filed a renewed motion to dismiss the case arguing that, in the absence of any federal claims in the action, the Petitioners should be allowed to participate ***effectively*** in the *Westgate* action by being relieved of the burden of also litigating their identical claims in the Georgia federal court, which leave to participate had been affirmatively acknowledged by the Eleventh Circuit. This motion was denied by the District Court on May 7, 2007, again without comment or opinion.

On June 22, 2007, Petitioners filed a second renewed motion to dismiss the case, arguing that Constitutional due process and judicial economy required that they be allowed to adjudicate their claims in the *Westgate* class action instead of in the Georgia federal court. While this second renewed motion to dismiss was pending and before ruling, on October 22, 2007, the District Court issued an order *sua sponte* calling for briefs on the question of whether it still had subject-matter jurisdiction based

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[6] *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1258 (11th Cir. 2006). The Eleventh Circuit did not reach the Due Process argument the dealers made for requiring dismissal. *Id.*

on two recent cases, *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 127 S.Ct. 1397 (2007), and *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007). After the issue was briefed, on January 22, 2008, the District Court dismissed the case for lack of subject-matter jurisdiction.

Ford appealed that ruling to the Eleventh Circuit. The Eleventh Circuit reversed the District Court, finding that the court did not lose subject-matter jurisdiction following the voluntary removal of the federal claims from the case via amended complaint. This ruling seemingly flew in the face of the *Rockwell* and *Pintando* decisions. Petitioners' motion for panel rehearing and rehearing *en banc* was denied without opinion. The Eleventh Circuit then remanded the case to the trial court for further proceedings.

This Petition followed.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals has entered a decision in conflict with another United States Court of Appeals on the same important matter. See Supreme Court Rule 10(a).

The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and it has decided an important federal question in a way that

conflicts with relevant decisions of this Court. See Supreme Court Rule 10(c).

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ELEVENTH CIRCUIT'S RULING BECAUSE IT IMPROPERLY HOLDS THAT THE DECISION ON WHETHER TO DISMISS A CASE FOR LACK OF SUBJECT-MATTER JURISDICTION IS NOT DEPENDENT ON THERE BEING FEDERAL CLAIMS IN THE CASE, BUT RATHER IS DEPENDENT ON THE MANNER IN WHICH FORMER FEDERAL CLAIMS WERE DISMISSED.

In *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457 (2007), this Court held that subject-matter jurisdiction generally depends on the original state of things at the time the action is brought, but if and when things change so, too, does the issue of federal jurisdiction:

> The state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction. (Citations omitted). **So also will the withdrawal of those allegations, unless they are replaced by others that establish jurisdiction. Thus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.** *Rockwell*, 549 U.S. at 473 (emphasis added).

The *Rockwell* ruling clearly says that if the federal claims are dismissed from a case via amended pleadings, then subject-matter jurisdiction disappears. The Eleventh's Circuit's ruling in this case is directly contrary to the *Rockwell* precedent. See Supreme Court Rule 10(c).

The law in other circuits is consistent with *Rockwell*, holding that once the last federal claim is eliminated from a "federal question" lawsuit by amendment of plaintiff's complaint, the federal courts automatically lose subject-matter jurisdiction and the case must be dismissed. See *Connectu, LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995); *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985) (all holding that the court must look only to the amended complaint in order to determine its subject-matter jurisdiction). These cases demonstrate a conflict in the circuits between their holdings and the holding of the Eleventh Circuit in this case. See Supreme Court Rule 10(a).

A different Eleventh Circuit case relied upon by the trial court below, *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007), was likewise totally faithful to the *Rockwell* precedent. In *Pintando,* the plaintiff originally sued for both a federal statutory violation and state-law fraud, giving the court subject-matter jurisdiction under §1331 for the federal claim, and supplemental jurisdiction under §1367(a) for the state-law claims. While the

defendant's summary judgment motion was pending seeking dismissal of both the state and federal claims, Mr. Pintando was allowed to amend his complaint to exclude the federal statutory claim. The District Court retained jurisdiction anyway, and adjudicated the summary judgment motion on the state-law claim on the merits, finding against Pintando.[7] Mr. Pintando appealed. The Eleventh Circuit began its discussion with the statement: "The question before us is whether the district court continued to possess subject-matter jurisdiction over Pintando's state law claims **after he amended his complaint** to no longer include any federal claim." *Pintando*, 501 F.3d at 1242 (emphasis added). Finding that the amendment deprived the district court of subject-matter jurisdiction in accordance with the Supreme Court's dictates found in *Rockwell*, the Eleventh Circuit vacated the summary judgment and remanded the case to the district court with instructions to dismiss the case without prejudice.

On the issue of "how" the federal claims are removed from the case, the *Pintando* court explained that concept succinctly:

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[7] Interestingly, Mr. Pintando agreed with the District Court in his case that the court retained supplemental jurisdiction even after dismissal of all federal claims. It was only on appeal that he changed his position, which was fine since jurisdiction may be challenged at any time during a case – even after judgment. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

> As a general matter, "[a]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary." (Citations omitted). **In this case, once the amended complaint was accepted by the district court, the original complaint was superseded and there was no longer a federal claim on which the district court could exercise supplemental jurisdiction for the remaining state law claims.**

Pintando, 501 F.3d at 1243 (emphasis added).

As far back as *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the Supreme Court held: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." This jurisprudence recognizes and pays due homage to the concept of limited federal jurisdiction, which itself pays due homage to the equally-important concepts of comity, federalism, and states' rights embodied in the Constitution itself.

Cases like *Gibbs*, *Rockwell*, and *Pintando*, have the same common legal theme or basis: once the federal claim in a "federal question" case is withdrawn or eliminated by amendment of the plaintiff's pleadings, the federal court loses subject-matter jurisdiction, and the case must be dismissed because there are no longer any federal claims "in the action"

supporting pendent or supplemental jurisdiction under §1367.

The District Court below properly interpreted these cases and §1367 and dismissed this case for lack of subject-matter jurisdiction. The Eleventh Circuit did ***not*** properly interpret these cases ***or*** §1367, and consequently it improperly reversed the decision of the District Court – all while citing no precedent in support of its decision. The decision of the District Court is faithful to the dictates and precedent of *Gibbs* and *Rockwell,* as well as the text of §1367(a), whereas the decision of the Eleventh Circuit in the present case is not. The Court should therefore grant this Petition, vacate the Eleventh Circuit's ruling, and reinstate and affirm the decision of the District Court dismissing the case for lack of federal jurisdiction.

II. CERTIORARI SHOULD BE GRANTED TO INTERPRET 28 U.S.C. §1367(C)(3) AS ONLY APPLYING WHEN THE PLAINTIFF'S CURRENT LIVE PLEADING CONTAINS A FEDERAL CLAIM.

The express terms of §1367(a) require that a federal claim be extant in the action if supplemental jurisdiction is to exist. That is because the statute only affords supplemental jurisdiction if there are "[federal] claims in the action." The statute does not say "claims in ***or that ever were in*** the action." The statute is decidedly present tense. By its express terms, §1367(a) says that a federal claim must

remain "in the action" if supplemental jurisdiction is to continue to exist. Once the federal claim is gone from the pleadings, so is supplemental jurisdiction.[8]

Section 1367(c)(3) then says that the court has discretion to retain jurisdiction even after "the federal court has dismissed" all the federal claims. At first blush, this seems to suggest a conflict between §1367(a), which requires a federal claim to be "in the action," and §1367(c)(3), which says the court may retain jurisdiction even after those federal claims are "dismissed" from the action. However, upon closer examination, these two provisions can peacefully co-exist if their actual words are honored and correctly construed.

A claim can still be "in the action" after having been dismissed under Rule 12(b)(6) or Rule 56 because the current live pleading of the plaintiff still contains that claim. That is, even though the court has found that the federal claim will not support a judgment, a federal claim dismissed under Rule 12(b)(6) or Rule 56 is still "in the action" for purposes

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[8] Supplemental jurisdiction is, first and foremost, a rule of judicial efficiency. It allows a federal court to adjudicate state-law claims only if and when it is also adjudicating coincident federal-law claims. However, according to *Rockwell* and going all the way back to *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 346 (1988), and even *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), pendent or supplemental jurisdiction loses its claim to "efficiency" – and hence its *raison d'être* – once the federal claims are removed from the action: there is no "two for one" any longer possible.

of §1367(c)(3) because it remains in the live complaint. Following such a dismissal, the court's §1367(c)(3) discretion would apply.

Once the court allows the plaintiff to amend his pleadings to remove the federal claims from the action, however, then those claims are no longer "in the action" to support jurisdiction but rather have been eliminated *as if they never existed in the first place.*

This construction of §1367 honors both the "discretion" afforded under §1367(c)(3) and the mandatory language of §1367(a) which requires that the federal claim be "in the action," consistently with *Rockwell.*

When Petitioners amended their complaint in 2002 and thereby eliminated all federal claims from the action, the court lost subject-matter jurisdiction under *Rockwell* and §1367(a). The fact that the District Court retained the case after that date, and the fact that the Eleventh Circuit entertained two appeals after the federal courts lost subject-matter jurisdiction, does not create or extend jurisdiction that was statutorily absent.

Federal courts are required to re-evaluate their jurisdiction at every new stage of the proceeding. *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 174 (1997) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). When the last federal claim was eliminated via amended complaint in December 2002, the District Court should have re-evaluated its

jurisdiction and dismissed the case under §1367(a) because there was no longer a federal claim "in the action." Even though it took the court six years to correct its error, the District Court properly dismissed the case under the *Rockwell* precedent in 2007.

If the rule is that a federal court must have a "hook" upon which to hang supplemental jurisdiction (and that is certainly what §1367(a) seems to say), and if that "hook" must be a substantial federal-question claim that is in the live pleadings and, therefore, "in the action," then when the plaintiff voluntarily removes the "hook" from the case with the court's permission, the statutory predicate for federal jurisdiction likewise disappears. This is the express holding in *Rockwell*, *Boelens*, *Connectu*, and *Wellness*.

Otherwise, if the rule is that "federal jurisdiction once established is always established," as the Eleventh Circuit has held, then the holdings in *Rockwell* and the numerous other cases cited above are clearly wrong and those cases should be overruled. It must be one or the other. The holdings in *Rockwell, Boelens, Connectu,* and *Wellness*, and the holding of the Eleventh Circuit in this case, cannot logically co-exist.

A Consistent Construction of the Entire Statute is Possible. No cases were found expressly addressing what the §1367(a) phrase "in the action" means. But since the plaintiff is the "master of his

claims,"[9] claims cannot logically be in the action for purposes of federal jurisdiction unless they are placed there by the plaintiff. It thus makes sense to interpret the §1367(a) phrase "in the action" to mean "in the plaintiff's current complaint."

Given that definition, the Court can give perfect consistency and equal force to both §1367(a) and §1367(c)(3) if these provisions are construed as follows:

> §1367(a) requires a federal claim to be "in the action" in order to supply supplemental jurisdiction. If a substantial federal claim is in the action (i.e., contained in plaintiff's current complaint), then even if the claim has been dismissed by the court, say, under Rule 12(b)(6) or on summary judgment under Rule 56, that claim is still "in the action" (i.e., still in plaintiff's live pleading) and may continue to support supplemental jurisdiction under the court's discretion found in §1367(c)(3). However, if the federal claim is removed from the case via an amendment of the plaintiff's complaint, then there is no

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[9] *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 12-13 (2003) (holding that a ***defendant*** may not invoke federal-question jurisdiction by asserting a defense available only under federal law; under the "well-pleaded complaint" rule, the plaintiff is in control of subject-matter jurisdiction and may avoid federal jurisdiction altogether by simply not pleading any federal claims). Under *Rockwell*, the plaintiff may likewise eliminate federal jurisdiction by removing any federal claims from the case via amended pleading.

> longer a federal claim "in the action" upon which to base ongoing supplemental jurisdiction under §1367(a), and the discretionary provisions of §1367(c) are likewise not applicable. Rule 12(h)(3) then requires dismissal.

No other construction of these two statutory subsections honors both of them. In the instant case, the Third Amended Complaint contains no federal claims, and when the District Court allowed that unopposed amendment, federal jurisdiction was lost.

As an added benefit, this construction allows §1331 to have a more-certain meaning in situations where pleaded federal claims are "insubstantial" and therefore subject to dismissal under Rule 12(b)(1). In that situation, the insubstantial nature of the federal claim(s) means there is, for jurisdictional purposes, no federal claim "arising under the Constitution, laws, or treaties of the United States" as required by §1331. This jurisprudence is by now axiomatic. See, e.g., *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006) (citing numerous cases; case must be dismissed upon order granting dismissal of federal claims under Rule 12(b)(1)).[10]

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[10] "With the vast expansion in the case dockets of all federal courts in recent years, the more settled the procedural system by which these cases are to run the judicial gauntlet, the better off will be litigants, lawyers, and judges." *Yazoo County Indus. Devel. Corp. v. Suthoff*, 454 U.S. 1157, 1161 (1982). The need for more clarity in federal procedure has not lessened – and actually may have become greater – in the past 27 years. See, *Nowak v.*

(Continued on following page)

To interpret "in the action" under §1367(a) to require a live complaint containing a substantial federal claim lends consistency and solidifies all prior case law holding that insubstantial federal claims do not support subject-matter jurisdiction under §1331, and hence cannot support supplemental jurisdiction under §1367. See, e.g., *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360 (C.A.D.C. 2007).

The Eleventh Circuit's Treatment of the DDCA Claim is Plain Error. The Eleventh Circuit's ruling, that because the DDCA claim was dismissed under Rule 12(b)(6) the District Court's jurisdiction was thereafter "cemented in place" regardless of what happened in the case thereafter, is wrong for at least two reasons.

First, it is far from clear that the DDCA claim was actually dismissed under Rule 12(b)(6). The dismissal order, App. 15-30, does not expressly say under which rule the claim was dismissed. But looking at the circumstances of that dismissal seems to point toward dismissal under Rule 12(b)(1).

The DDCA claim was dismissed very early in the case, before discovery and before Ford answered or

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Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1188-89 (2nd Cir. 1996) (describing the difficulty in deciding whether a case should be dismissed under Rule 12(b)(1) or Rule 12(b)(6) and the jurisdictional consequences of each). The construction of §1367 proposed in this Petition eliminates or greatly reduces the uncertainty such cases have struggled with.

asserted any defenses, based on a finding by the District Court that Petitioners had failed to assert a prima facie element of a DDCA claim: coercive conduct via a wrongful demand. That is, the District Court dismissed the DDCA claim not because Petitioners could not prove any set of ***facts*** in support of their claim (the customary basis under Rule 12(b)(6)), but because it found the claim itself legally foreclosed by the definition given to the ***elements*** of a DDCA claim by a prior court:

> As such, Ford's demand, explicit or implicit, that the plaintiffs participate in the CPA program or pay inflated published wholesale prices **is not a wrongful demand and does not constitute coercion or bad faith within the meaning of** the Dealers' Day in Court Act. Consequently, the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim is GRANTED.

App. 22-23 (emphasis added). The DDCA claim was thus dismissed for the reason claims are typically dismissed under Rule 12(b)(1): failure to plead the prima facie elements necessary to assert a legally-viable claim.[11] Another way to say this is to say the

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[11] See, e.g., *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1328 (Fed. Cir. 1998), overruled o.g., *Midwest Indust., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999) (describing as "nontrivial" the distinction between a dismissal of a federal claim under Rule 12(b)(1) and Rule 12(b)(6) for purposes of supplemental jurisdiction under §1367, and finding that failure to plead sufficiently to support the

(Continued on following page)

DDCA claim was legally attenuated and insubstantial, or "wanting in substance" as *Gibbs* phrases it. *Gibbs*, 383 U.S. at 722. Such claims do not support federal-question jurisdiction under §1331. See, e.g., *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360 (Fed. Cir. 2007). Here, since the District Court dismissed the DDCA claims immediately by holding that those claims did not allege "a wrongful demand" as required by the DDCA, the District Court found those claims to be attenuated and insubstantial (i.e., lacking substance) even if it did not expressly say so.

Whether a case is dismissed under Rule 12(b)(6) or Rule 12(b)(1) is also not dependent on which rule the District Court cites in its dismissal order (although none was cited here). Often times a dismissal nominally made under Rule 12(b)(6) has been construed instead to be under Rule 12(b)(1), and vice versa, because the circumstances of the dismissal and the nature of the purported federal claim determine which rule properly applies. See, e.g., *Gould Electronics, Inc. v. U.S.*, 220 F.3d 169 (3rd Cir. 2000) (Rule 12(b)(1) dismissal should have been made instead under Rule 12(b)(6)); *Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir. 1999) (Rule 12(b)(6) dismissal should have been made instead under Rule 12(b)(1)).

Here, the District Court may or may not have based its dismissal on Rule 12(b)(6), but given the

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prima facie elements of the claim renders the claim "insubstantial" and subject to Rule 12(b)(1) dismissal).

reasoning for its ruling, it seems better to say the DDCA claim was (or should have been) dismissed under Rule 12(b)(1) because the court found the claim legally insubstantial based on controlling precedent.

Contrary to what the Eleventh Circuit held, if only the DDCA and state-law breach of contract claims had been originally brought by Petitioners, the District Court would have been duty-bound to dismiss the case when it dismissed the DDCA claim. This is so because only **viable** federal claims will support supplemental jurisdiction under §1367(a). See *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (federal courts lack §1331 subject-matter jurisdiction over federal claims that are "attenuated and unsubstantial," and hence also lack pendent or supplemental jurisdiction). The DDCA claim therefore could not provide the "hook" necessary to support supplemental jurisdiction, either before or after it was dismissed by the court in 2000.

Second, even if the DDCA claim had been dismissed in 2000 under Rule 12(b)(6), the subsequent, uncontested elimination of ***both*** the DDCA ***and*** RPA claims by amendment to Petitioners' complaint in 2002 meant that there were then no longer any federal claims "in the action" pursuant to the subject-matter jurisdiction test set out in the express text of §1367(a) and the *Rockwell* case.

Thus, in this case it is immaterial whether the DDCA claim was originally dismissed under Rule

12(b)(6) or Rule 12(b)(1), because it was later eliminated from the case by amended pleadings in 2002, and this 2002 pleading amendment deprived the court of subject-matter jurisdiction under *Rockwell*.

CONCLUSION

This case addresses one of the most important legal issues in federal jurisprudence: subject-matter jurisdiction. It also addresses a sub-issue never ruled upon by this Court that is causing unnecessary confusion and conflict in the lower courts: the harmonization of §1367(a) with §1367(c)(3). The Court should grant the Petition to clear up this confusion and resolve the conflict in the circuits.

In this case, there is no longer any federal-question jurisdiction because there are no federal claims pending "in the action" under §1367(a). The "hook" upon which supplemental jurisdiction was originally hung has been eliminated via amended pleadings. Therefore, the Constitution, federal statutes, and prior decisions of this Court preclude the federal courts from adjudicating the case. The District Court's decision to dismiss the case was entirely proper.

The Eleventh Circuit, however, held that because the first federal claim was involuntarily dismissed from the case, this somehow "cemented in place" the court's supplemental jurisdiction forever, regardless

of what happened later. This conclusion is not consistent with, much less required by, §1367. Indeed, it is expressly contrary to *Rockwell, Boelens, Connectu,* and *Wellness*. The Third Amended Complaint not only removed the RPA claim but it removed the DDCA claim as well, so regardless of which federal claim served as the "hook" for supplemental jurisdiction *originally*, that hook is now gone due to amended pleading.

There is no case precedent supporting the ruling by the Eleventh Circuit or its hypothetical scenarios, and in fact its ruling is contrary to the concept of limited federal jurisdiction, the express terms of §1367(a), and the recent decisions of this Court and other circuit courts.

Finally, the Eleventh Circuit's ruling creates a situation where federal jurisdiction is based, not on the claims pending in the action as required by the Constitution and federal statutes, but rather on whether the federal claims are voluntarily or involuntarily dismissed – a wholly-unworkable and unprecedented basis on which to found jurisdiction.

The Petition for Writ of Certiorari should be granted so the decision of the Eleventh Circuit may be vacated and the decision of the District Court affirmed.

Respectfully submitted,

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Attorneys for Petitioners

United States Court of Appeals
For the Eleventh Circuit

No. 08-12587

District Court Docket No.
99-00173-CV-RLV-4

BAYSHORE FORD TRUCKS SALES, INC.,
HEINTZELMAN'S TRUCK CENTER, INC.,
LJL TRUCK CENTER, INC.,
PEACH STATE FORD TRUCK SALES, INC.,
VALLEY FORD TRUCK SALES, INC.,
Individually and as Representatives for a
Class of Similarly Situated Entities,

Plaintiffs-Appellees,

WESTGATE CLASS,

Intervenor Plaintiff-Appellee,

versus

FORD MOTOR COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Nov. 10, 2008)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: November 10, 2008
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12587
Non-Argument Calendar

D. C. Docket No. 99-00173-CV-RLV-4

BAYSHORE FORD TRUCKS SALES, INC.,
HEINTZELMAN'S TRUCK CENTER, INC.,
LJL TRUCK CENTER, INC.,
PEACH STATE FORD TRUCK SALES, INC.,
VALLEY FORD TRUCK SALES, INC.,
Individually and as Representatives for a
Class of Similarily [sic] Situated Entities,

Plaintiff-Appellees,

WESTGATE GLASS,

Intervenor Plaintiff-Appellee,

versus

FORD MOTOR COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

(November 10, 2008)

Before TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The district court dismissed this case for lack of jurisdiction on the ground that our decision in *Pintando v. Miami-Dade Housing Agency,* 501 F.3d 1241 (11th Cir. 2007), mandated the dismissal. Appellant challenges the court's decision, arguing that *Pintando* is inapposite. We agree that it is.

In *Pintando,* the plaintiff invoked the district court's federal question jurisdiction, 28 U.S.C. §§ 1331 and 1343, by seeking relief under Title VII of the Civil Rights Act of 1964, and the court's supplemental jurisdiction, 28 U.S.C. § 1367, by seeking relief for violations of state law. After the defendant moved for summary judgment, the plaintiff moved the court for leave to amend his complaint. The court granted his motion, and he filed an amended complaint which deleted the Title VII claim and reasserted the state law claims. The court granted the defendant summary judgment on the state law claims, and the plaintiff appealed. We held that the amended complaint deprived the district court of supplemental jurisdiction; plaintiff's *voluntary* abandonment of the Title VII claim operated to divest the court of its federal question jurisdiction and with it the court's supplemental jurisdiction to litigate the state law claims.

In the case at hand, and as we observed in *In re Bayshore Ford Truck Sales, Inc.,* "[a]t the time the

law suit was filed, the [district] court had subject matter jurisdiction based on the [plaintiffs'] federal statutory claims." 471 F.3d 1233, 1241 n.16. After the court *involuntarily* dismissed plaintiffs' claims under the Automobile Dealers' Day in Court Act, the fact that plaintiffs, in their amended complaint, *voluntarily* deleted the claims brought under the Robinson-Patman Act, did not preclude the court from continuing to exercise its supplemental jurisdiction over plaintiffs' state law claims. *Id.*

We see no difference in the instant scenario than a scenario in which the plaintiff's complaint contains one federal claim and one state law claim within the court's supplemental jurisdiction, and the court dismisses the federal claim under Fed. R. Civ. P. 12(b)(6), (c), or 56 and then decides, in the exercise of the discretion § 1367 affords it, to litigate the state law claim to judgment. We could not say that the court lost its subject matter jurisdiction once it dismissed the federal claim. Take the scenario one step further and suppose that the court, after announcing that it was retaining jurisdiction, allows the plaintiff to amend its complaint to restate the state law claim. Would this destroy the court's jurisdiction? We think not. That is, in effect, what occurred here – what we observed in *In re Bayshore Ford Truck Sales, Inc.* – plaintiffs amended their complaint, reasserting their state law claims, after the court dismissed involuntarily one of their federal statutory claims. If the district court is correct – that it lost jurisdiction once plaintiffs amended their complaint to restate their

state law claims – then this court, in *In re Bayshore Ford Truck Sales, Inc.,* surely missed the mark; it should have vacated the district court's order enjoining Westgate Ford Truck Sales, Inc. from prosecuting the Ohio class action, and instructed the district court to dismiss the case for lack of jurisdiction. This court was fully aware of the fact that, at the time the case came before it on appeal, the only claims still pending before the district court were plaintiffs' breach of contract claims; yet, it proceeded to entertain, and adjudicate, the appeal on the merits.

The district court properly exercised its supplemental jurisdiction after involuntarily dismissing plaintiffs' claims under the Automobile Dealers' Day in Court Act. The fact that plaintiffs amended complaint did not contain their Robinson-Patman Act claims did not oust the court of supplemental jurisdiction. The judgment of the district court is vacated and the case is remanded for further proceedings.

VACATED and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK SALES, INC., et al.,	
Plaintiffs,	CIVIL ACTION
v.	NO. 4:99-CV-173-RLV
FORD MOTOR COMPANY,	
Defendant.	

ORDER

(Filed Apr. 8, 2008)

This matter is before the court upon Ford Motor Company's motion to alter or amend judgment [Doc. No. 357], in which Ford seeks to have this court reconsider its January 23, 2008, order dismissing the action for lack of jurisdiction.

Most of Ford's arguments are simply restatements of arguments previously made and rejected by the court. The court agrees (as noted in its January 23 order that Pintando v. Miami-Dade Housing Agency 501 F.3d 1241 (11th Cir. 2007), is not 100% on point. The court will not repeat its analysis here.

Ford takes issue with the court's characterization of the inclusion of the previously dismissed federal Dealer Day in Court in the plaintiffs' Third Amended Complaint as a "scrivener's error." However, the parties stipulated "that Plaintiffs' Dealer Day in

Court Act claims are dismissed and remain dismissed by operation of the Court's January 10, 2000 Order and are not revived and were not intended by any party to be revived by the subsequent filing of the Third Amended Complaint." Regardless of how the inclusion of the Dealer Day in Court claim is characterized, it is clear that such inclusion was erroneous and was of no legal effect whatsoever. The court, like parties, treated the inclusion as if it had never happened.

Ford also argues that in a previous appeal in this case, Bayshore Ford Truck Sales, Inc. v. Ford Motor Co., 471 F.3d 1233 (11th Cir. 2006), the Eleventh Circuit recognized that this court had supplemental jurisdiction over the remaining state law claims. This court agrees that, in 2006, the Eleventh circuit assumed that this court could properly exercise supplemental jurisdiction; this court had the same belief, in 2006. However, in 2007, the United States Supreme Court decided Rockwell International Corp. v. United States, ___ U.S. ___, 127 S.Ct. 1397 (2007), and later that year, the Eleventh Circuit, relying on *Rockwell International*, decided Pintando v. Miami-Dade Housing Agency 501 F.3d 1241 (11th Cir. 2007). Those cases changed the law with respect to a district courts ability to exercise supplemental jurisdiction in certain circumstances.

Again, the court recognizes that the instant case in not totally on point with *Rockwell International* and *Pintando*, but as discussed in the court's January 23 order, the court finds the reasoning in those cases

to be applicable to the instant case. There are no new arguments in Ford's brief that would warrant this court's reaching a different decision.

For the forgoing reasons, Ford's motion to alter or amend judgment is DENIED.

SO ORDERED, this 8th of April, 2008.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK SALES, INC., et al.,	
Plaintiffs,	CIVIL ACTION
v.	NO. 4:99-CV-173-RLV
FORD MOTOR COMPANY,	
Defendant.	

ORDER

(Filed Jan. 22, 2008)

This action, arising out of various franchise agreements between Ford Motor Company and five Ford medium- and heavy-duty truck dealers, was originally filed on July 1, 1999. The court subsequently noted that the complaint was the kind of "shotgun pleading" that the Eleventh Circuit has repeatedly condemned. By order filed on September 21, 1999, the court directed the plaintiffs to file an amended and recast complaint. That amended and recast complaint was filed on October 21, 1999.

In that amended complaint, the plaintiffs alleged that Ford Motor Company had breached its contracts with the plaintiffs and violated both the Robinson-Patman Act, 15 U.S.C. § 13, and the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221-225. By order docketed on January 19, 2000, the court

dismissed the Automobile Dealers' Day in Court claims but declined to dismiss the Robinson-Patman claims and the state law breach of contract claims.

The plaintiffs sought class certification of their claims, but by order filed on September 5, 2000, this court denied the plaintiffs' motion. The court subsequently denied the plaintiffs' motion for reconsideration. The plaintiffs then sought permission to appeal that order pursuant to Rule 23(f), Federal Rules of Civil Procedure, but the Court of Appeals for the Eleventh Circuit later denied that request.

On November 14, 2002, the plaintiffs filed a motion, seeking leave to amend their complaint. That motion specifically stated, "Plaintiffs' motion to amend the complaint facilitates the ends of justice because it seeks to stream-line, not expand, the litigation by deleting Count Three, Violations of the Robinson-Patman Act, 15 U.S.C. § 13(a), and clarifying that the remaining litigation only contemplates actionable conduct occurring within the period of six (6) years next preceeding the commencement of the instant action."

By order filed on December 6, 2002, the court granted the motion and directed that the Exhibit A attached to the motion to amend would be considered the amended complaint. However, through a scrivener's error, that amended complaint contained an Automobile Dealers' Day in Court claim. The parties acknowledged that the inclusion of that claim was by error and by consent order filed on January 22, 2003,

agreed and stipulated "that Plaintiffs' Dealer Day in Court Act claims are dismissed and remain dismissed by operation of the Court's January 10, 2000 Order and are not revived and were not intended by any party to be revived by the subsequent filing of the Third Amended Complaint."

Considerable activity occurred between the filing of that amended complaint and October 22, 2007, when the court asked the parties to file briefs addressing the question of whether Pintando v. Miami-Dade Housing Agency 501 F.3d 1241 (11th Cir. 2007), requires that this action be dismissed for lack of subject matter jurisdiction.

Pintando, relying on Rockwell International Corp. v. United States, ___ U.S. ___, 127 S.Ct. 1397 (2007), held that when a complaint asserting federal question jurisdiction, and which contains both federal and state claims, is amended to delete the federal claim, such amendment destroys jurisdiction and that the complaint had to be dismissed. The court distinguished those cases where the court dismisses the federal claim; in such cases, 28 U.S.C. § 1367(c)(3) allows the court to exercise supplemental jurisdiction. The court emphasized the language of section 1367(c)(3) which allows a federal court to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction."

The Eleventh Circuit specifically held that if the federal claim is dismissed by the plaintiff through the

filing of a subsequent complaint, that subsequent complaint supersedes the original complaint. "In this case, once the amended complaint was accepted by the district court, the original complaint was superceded and there was no longer a federal claim on which the district court could exercise supplemental jurisdiction for the remaining state law claims." *Pintando,* 510 F.3d at 1243.

This court acknowledges that the facts of the instant case are slightly different from those in *Pintando.* Here, there were two federal claims; one was dismissed by the court, and the other was dismissed by the plaintiffs. If the plaintiffs had dismissed their Robinson-Patman claim and the court had subsequently dismissed their Dealers' Day in Court claim, there clearly would be supplemental jurisdiction over the remaining state law claims. In such a situation there would not have been an amended complaint containing just the state law claims and superseding the original complaint.

However, that is not what happened in the instant case. After the court had dismissed the Dealers' Day in Court claim, the plaintiffs then filed an amended complaint, which deleted their Robinson-Patman claim and contained only state law claims.[1]

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[1] The fact that the amended complaint, through a scrivener's error, restated the Dealers' Day in Court claim is irrelevant. Such inclusion has been acknowledged to be an error, and the defendant does not argue that such erroneous inclusion should cause a different result.

Based upon the clear language in *Pintando,* this court concludes that since the amended complaint contains only state law claims and since the parties are not diverse, the court lacks subject matter jurisdiction.

Because of the extremely large amount of time and money that the parties have expended in this litigation, the court regrets that the action must be terminated with no adjudication on the merits. However, the court has no choice, since the law is clear that a court may not adjudicate a case over which it does not have subject matter jurisdiction.

For the foregoing reasons, this case is dismissed for lack of subject matter jurisdiction.

SO ORDERED, this 23rd day of January, 2008.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Bayshore Ford Truck Sales, Inc., et al.,	
Plaintiffs,	CIVIL ACTION
v.	NO. 4:99-CV-173-RLV
Ford Motor Company,	
Defendant.	

ORDER

(Filed Jan. 19, 2000)

This action arises out of various franchise agreements between Ford Motor Company and five Ford medium- and heavy-duty truck dealers. The plaintiffs allege that the defendant, Ford Motor Company ("Ford"), breached its contracts with the plaintiffs and violated several federal statutes in administering its pricing programs. Before the court is the defendant's motion to dismiss for failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. Pro. 12(b)(6) [Doc. No. 16].

I. FACTUAL BACKGROUND[1]

Until 1998, each of the five plaintiffs was a Ford heavy- and medium-duty truck dealer that serviced customers throughout the United States.[2] The plaintiffs, therefore, competed with each other and with dealers of other brands of medium- and heavy-duty trucks on a nationwide basis. Each plaintiff operated under a franchise agreement with Ford, the material terms of which are substantively identical to each other. Under the franchise agreements, the plaintiffs would purchase heavy- and medium-duty trucks and other company products, such as replacement parts, from Ford for resale to the public.[3] According to Paragraph 10 of the franchise agreement, Ford was required to publish all prices and discounts to the plaintiffs, as follows:

> Sales of COMPANY PRODUCTS by the Company to the Dealer hereunder will be made in accordance with the prices, charges,

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[1] The court draws the facts from the plaintiffs' complaint, the allegations of which the court must accept as true for purposes of ruling on Ford's motion to dismiss. *See Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998).

[2] Ford ceased manufacturing and distributing heavy- and medium-duty trucks in 1998.

[3] Ford's medium- and heavy-duty trucks were sold to dealers as bare chassis. The chassis was a component of the complete vehicle, which was usually assembled by the dealer, a special company called a "body company," or by the final, retail customer. The chassis was typically ordered by the dealer for resale to a particular retail customer and was configured to the retail customer's specifications.

> discounts and other terms of sale set forth in price schedules and other notices published by the Company to the Dealer from time to time in accordance with applicable HEAVY TRUCK TERMS OF SALE BULLETIN or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN. Except as otherwise specified in writing by the Company, such prices, charges, discounts and terms of sale shall be those in effect, and delivery to the Dealer shall be deemed to have been made and the order deemed to have been filled on the date of delivery to the carrier or the Dealer, whichever occurs first. The Company has the right at any time and from time to time to change or eliminate prices, charges, discounts, allowances, rebates, refunds or other terms of sale affecting COMPANY PRODUCTS by issuing a new HEAVY DUTY TRUCK or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN, new price schedules or other notices.

Although the plaintiffs admit that Ford published wholesale prices to them, the plaintiffs contend that, in approximately 1980, Ford began intentionally pricing its medium- and heavy-duty trucks at wholesale prices far in excess of the retail prices these trucks could command in the marketplace. At about the same time, Ford also implemented a pricing program called the "Competitive Price Assistance," or "CPA," program whereby the plaintiffs could apply for and receive discounts or concessions off these inflated wholesale prices, reducing the final wholesale price to

a level below the retail price at which the trucks were resold. As a consequence, the plaintiffs were not able to resell Ford medium-and heavy-trucks for a profit without the CPA program.

According to the plaintiffs, the true purpose of the CPA program was to allow Ford to control dealer profits on the sale of medium- and heavy-duty trucks. Ford accomplished this goal by offering two levels of discounts through the CPA program. The first level, called the "Rainbow Schedule" discounts, was published to the plaintiffs and was generally available to all dealers at all times on virtually all sales.[4] The second level, called the "Appeal-level CPA" discounts, was not published to the plaintiffs or made generally available to all dealers.

The plaintiffs contend that the Appeal-level CPA discounts were given by Ford at its sole discretion based on unpublished criteria.[5] As a result, the

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[4] This level was later discontinued and replaced with another program called the "Sales Advantage CPA." This program also was published to the plaintiffs and made generally available to all dealers.

[5] Specifically, when applying for an Appeal-level CPA discount, the dealer was required to identify the retail customer and provide the proposed retail price. Ford then responded in one of three ways: (1) no Appeal-level CPA discount was given; (2) an amount of Appeal-level CPA discount was given, but that amount was insufficient to bring the published wholesale price below the retail price; or (3) just enough Appeal-level CPA discount was given to reduce the published wholesale price to a level that allowed the dealer to realize a profit of between 0%

(Continued on following page)

plaintiffs had no way of knowing whether they were receiving the greatest possible Appeal-level CPA discount. Ford's Appeal-level CPA discounts on comparable trucks could vary among dealers by as much as $15,000 per truck.

In addition to the Appeal-level CPA discounts, Ford also operated a price program on replacement parts to dealers. Under this program, certain dealers could obtain unpublished discounts off the published wholesale price on certain purchases of replacement parts. These unpublished discounts were not available to the plaintiffs or to all dealers generally. According to the plaintiffs, Ford intentionally withheld information and deceived and misled the plaintiffs about the Appeal-level CPA and replacement parts discounts Ford was offering to some dealers.

The plaintiffs filed this law suit alleging that Ford breached the price publication requirements of the franchise agreements and violated the Dealers' Day in Court Act and the Robinson-Patman Act. Ford filed a pre-answer motion to dismiss all three of the plaintiffs' claims for failure to state claims upon which relief can be granted.

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and 4% of the total retail price. If either of the first two responses was given, the dealer typically lost the sale.

II. LEGAL DISCUSSION

A. Legal Standard

When considering a Rule 12(b)(6) motion to dismiss, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs. *See Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir.1998). A Rule 12(b)(6) motion to dismiss should be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their allegations which would entitle them to relief. *Id.*

B. Breach of Contract

With regard to their breach of contract claim, the plaintiffs contend that Ford breached its obligation under paragraph 10 of the franchise agreements to publish the prices and discounts for its medium- and heavy-duty trucks and replacement parts and to sell its products at those published prices. According to the plaintiffs, paragraph 10 required Ford to publish the same prices and discounts to each of the plaintiffs and to all other dealers operating under a similar franchise agreement and that the purpose of this provision was to ensure equitable pricing among competing dealers. Specifically, the plaintiffs' second amended complaint alleges the following: (1) the existence of valid contracts between the plaintiffs and the defendant; (2) that the defendant breached these contracts by failing to publish prices, discounts, and other terms of sale to the plaintiffs and by failing to

sell its products in accordance with the published prices, discounts, and other terms of sale; (3) that the plaintiffs were damaged as a result of the alleged breach.

Ford argues that paragraph 10 of the franchise agreements did not require Ford to publish its prices in the manner the plaintiffs maintain, and, therefore, Ford's failure to do so cannot constitute a breach. While Ford's interpretation of the contract ultimately may prove to be correct, the language of the contract is not so clear and unambiguous that the court is prepared to find as a matter of law that the defendant did not breach the agreement. *Meagher v. Wayne State University*, 565 N.W.2d 401, 415 (Mich. Ct. App. 1997) (noting that, under Michigan law, where the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties, making summary disposition inappropriate).[6] At this juncture, the court cannot say that it is beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief on their breach of contract claim. Contrary to Ford's assertions, the plaintiffs' allegations are sufficient to state a claim for breach of contract. Accordingly, the defendant's motion to dismiss the plaintiffs' breach of contract claim is **DENIED**.

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[6] The court cites Michigan law in this instance because the franchise agreements at issue in this case selected the law of Michigan to govern any contract disputes between the parties.

C. Dealers' Day in Court Act

Ford also moves to dismiss the plaintiffs' Dealers' Day in Court claim for failure to allege a lack of good faith involving coercion, intimidation, or a threat thereof. The Federal Automobile Dealers Franchise Act, commonly referred to as the "Automobile Dealers' Day in Court Act," 15 U.S.C. §§ 1221-1225, gives an automobile dealer a cause of action against an automobile manufacturer for failing to act in good faith in performing or complying with the terms of the franchise agreement between the dealer and the manufacturer. The term "good faith" used in the Dealers' Day in Court Act has a narrow and specialized meaning. An allegation of bad faith in the ordinary sense does not support a Dealers' Day in Court Act claim. Rather, the dealer must allege "coercion, intimidation or threats of coercion or intimidation." 15 U.S.C. § 1221(e); *see also Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985) ("In the absence of coercion, intimidation or threats thereof, there can be no recovery under the Act, even if the manufacturer otherwise acts in "bad faith" as that term is normally used."). Coercive conduct may be shown by "a wrongful demand which will result in sanctions if not complied with." *H.C. Blackwell Co., Inc. v. Kenworth Truck Co.*, 620 F.2d 104, 107 (5th Cir. 1980).

In this instance, the plaintiffs alleged that Ford created the CPA program to circumvent its contractual obligations to publish its prices, discounts, etc., to each of the plaintiffs and to sell its products at

those published prices. The plaintiffs further alleged that Ford "used its size and power to coerce and intimidate" the plaintiffs into using the CPA program to their detriment and described the defendant's treatment of the plaintiffs in pricing medium- and heavy-duty trucks as "discriminatory, coercive and unfair." However, beyond these conclusory allegations of coercion, the plaintiffs do not allege specific conduct on the part of the defendant that was coercive or threatening; nor do the plaintiffs provide an example of a wrongful demand made by the defendant or of sanctions that will result if the demand is not complied with.

In their brief, the plaintiffs argue that, in drawing all inferences in a light most favorable to the plaintiffs, their complaint alleges economic coercion by the defendant. Specifically, the plaintiffs argue that the defendant wrongfully demanded that they participate in the CPA program or be forced to pay wholesale prices so exorbitant that they would be driven out of business and that this was an implicit rather than overt threat. However, as Judge Evans correctly concluded in *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555 (N.D. Ga. 1992), a manufacturer is free to set its wholesale price or its price discounts at whatever level the manufacturer chooses without running afoul of the Dealers' Day in Court Act. *Id.* at 1566-67. As such, Ford's demand, explicit or implicit, that the plaintiffs participate in the CPA program or pay inflated published wholesale prices is not a wrongful demand and does constitute

coercion or bad faith within the meaning of the Dealers' Day in Court Act. Consequently, the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim is **GRANTED**.

D. Robinson-Patman Act

Ford also moves to dismiss the plaintiffs' claim asserting a violation of Section 2(a) of the Robinson-Patman Act. The Robinson-Patman Act prohibits a seller from engaging in unlawful price discrimination among its customers. 15 U.S.C. § 13a. To establish a Robinson-Patman Act claim, the plaintiffs must plead and prove: (1) that the sales at issue were made in interstate commerce, (2) that the goods sold were of like grade and quality, (3) that the defendant discriminated in price between the purchasers of the goods, and (4) that the discrimination had a prohibited effect on competition. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990); *see also McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988).

Ford contends that the plaintiffs' complaint is insufficient for several reasons. First, Ford argues that the plaintiffs failed to allege that the trucks at issue were of "like grade and quality" and failed to allege an impact on competition. After a review of the plaintiffs' complaint, the court finds that the plaintiffs have adequately pled the elements of like grade and quality and impact on competition under the

notice pleading requirements of Rule 8, Federal Rules of Civil Procedure.

The purpose of notice pleading is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Quality Foods v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The specificity with which Ford contends the plaintiffs must plead their Robinson-Patman Act claim is not warranted under this liberal pleading standard. Whether the trucks in issue are in fact of like grade and quality or whether the favored and disfavored purchasers were in fact competing on the same functional level in the same geographic markets will require further investigation through discovery and is more properly addressed at summary judgment.

The same is also true with regard to Ford's contention that the plaintiffs failed to allege contemporaneous sales. Ford provides no authority for the proposition that the plaintiffs must affirmatively allege that the sales that form the basis of the claim were contemporaneous in order to comply with Rule 8. It is true that "the sales under comparison must be reasonably contemporaneous" as stated in *Black Gold, Ltd. v. Rockwool Indus.*, 729 F.2d 676, 683 (10th Cir. 1984). However, nothing in *Black Gold* or the other cases cited by Ford requires a plaintiff to affirmatively plead contemporaneousness in the

complaint to avoid dismissal for failure to state a claim.[7]

Ford also contends that the plaintiffs failed to allege that the CPA discounts were not functionally available to them. However, functional availability is not an essential element of the plaintiffs' claim, but a defense available to the defendant to negate the essential element of price discrimination. *See Delong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1516-17 (11th Cir. 1989) (discussing the "the judicially created "availability defense"); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326-27 n.17 (5th Cir. 1998) (noting that the functional availability theory is technically not an affirmative defense, but the negation of an element of the plaintiff's case); *see generally* 3 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 25.7 at 455 & n.79 (1983) (stating that availability may operate as either a rebuttal of the plaintiff's prima facie case or as a

---

[7] The procedural posture of each of the three cases cited by Ford makes those cases inapplicable here. All three involved a review of the facts in the record, not a review of the allegations in the complaint.

The court could find only one case involving a defendant's motion to dismiss a Robison-Patman Act claim for failure to affirmatively plead contemporaneous sales. In that case, the district court denied the motion, stating, "The necessary relationship of two sales to bring them within the scope of Section 2(a) is a matter of many facts, and a cause of action should not be dismissed for failure to plead complete details such as specific dates of sales." *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 235 (D.N.J. 1956).

defense and noting that "the issue is more likely to be expressly raised by the defendant than by the plaintiff") As such, it is not necessary for the plaintiffs to plead functional availability in their complaint, and a failure to do so will not result in dismissal.

Finally, Ford claims that the plaintiffs' complaint is insufficient because it contains no allegation of two completed sales to different purchasers. According to Ford, the plaintiffs claim rests on a competitive bidding process and that, under *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), this sort of claim is not cognizable under the Robinson-Patman Act.

To state a claim under the Robinson-Patman Act, the plaintiffs must allege at least two sales "at two different prices to two different actual buyers." *M.C. Manufacturing Co.*, 517 F.2d at 1065; *Pierce v. Commercial Warehouse, Div. of Thompson Automotive Warehouse*, 876 F.2d 86, 87 (11th Cir.1989). In a competitive bidding situation, in which only one of the bidders will ultimately secure the sale, the two-purchaser requirement cannot be met. The Robinson-Patman Act requires competitive buyers not competitive bidders. *M.C. Manufacturing Co.*, 517 F.2d at 1066-67.

Ford admits in its brief that the plaintiffs' complaint alleges both completed sales of comparable trucks at higher prices and lost bids. Def.'s Br. At 17. After reviewing the complaint, the court agrees with this assessment. *See* Pls.' Compl. at ¶¶ 79 & 82.

However, Ford asserts that the plaintiffs "did not actually buy any vehicles from Ford in competition with any other dealer at a higher price as a result of the disputed discounts, because the agreement to purchase the vehicle by the ultimate consumer was entered into before any actual vehicle sales occurred to fulfill the contracts." In support of this contention, Ford cites paragraph 37 of the complaint, which states:

> When applying for Appeal-Level CPA, the named Plaintiffs and other dealers were required to tell Ford the identity of the dealer's retail customer and the proposed retail price the dealer anticipated charging for the truck(s). Ford then gave, in its sole discretion, either:
>
> a. no Appeal-Level CPA;
>
> b. an insufficient amount of Appeal-level CPA to bring the True Dealer Cost below retail price (effectively precluding the dealer from completing the transaction); or
>
> c. just enough Appeal-Level CPA to reduce the True Dealer Cost to a level that would allow the dealer to realize a profit of from 0% to 4% of the total retail price.

However, this paragraph of the complaint does not say as much as Ford contends it says. Neither this paragraph nor the other allegations of the complaint

make it clear that all the sales at issue arose in a competitive bidding context.

The court notes that the problem with Ford's argument on this issue may be one of timing.[8] Whether the plaintiffs' allegations are in fact supported by any evidence or are in fact true are not issues before the court on a motion to dismiss for failure to state a claim. If Ford's contention is true that all of the plaintiffs' transactions arise in a competitive bidding context, these facts will come to light during discovery. At that time, Ford may move for summary judgment on the basis that the plaintiffs have failed to present any evidence of two competing purchasers. *See, e.g., Capital Ford Truck Sales, Inc. v. Ford Motor Company*, 819 F. Supp. 1555, 1574 (N.D. Ga. 1992) (finding that the record established that the two-purchaser requirement was not met, thus entitling the defendant to summary judgment). However, at this stage in the proceedings, the plaintiffs' complaint alleges that they bought trucks of like grade and quality at higher prices than other competing dealers, and, for purposes of this motion to dismiss, the court must accept that allegation as true.

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[8] The same is true of the plaintiffs' argument that they fall within the narrow exception to the two-purchaser requirement established in *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951).

III. CONCLUSION

For the reasons discussed above, the court **GRANTS IN PART** and **DENIES IN PART** the defendant's motion to dismiss. Specifically, the court **GRANTS** the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim, but **DENIES** the defendant's motion to dismiss the plaintiffs' breach of contract and Robinson-Patman Act claims.

SO ORDERED, this 19th day of January, 2000.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12587-JJ

BAYSHORE FORD TRUCKS SALES, INC., HEINTZELMAN'S TRUCK CENTER, INC., LJL TRUCK CENTER, INC., PEACH STATE FORD TRUCK SALES, INC., VALLEY FORD TRUCK SALES, INC., Individually and as Representatives for a Class of Similarly Situated Entities,

Plaintiffs-Appellees,

WESTGATE CLASS,

Intervenor Plaintiff-Appellee,

versus

FORD MOTOR COMPANY,

Defendant-Appellant.

- -

On Appeal from the United States District Court for the Northern District of Georgia

- -

ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

(Filed Jan. 7, 2009)

Before: TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK SALES, INC., HEINTZELMAN'S TRUCK CENTER, INC., LJL TRUCK CENTER, INC., PEACH STATE FORD TRUCK SALES, INC., and VALLEY FORD TRUCK SALES, INC., individually and as Representatives for a Class of Similarly Situated Entities,	*	CIVIL ACTION NO. 4:99-CV-0173-RLV
Plaintiffs,	*	
vs.	*	
FORD MOTOR COMPANY,	*	
Defendant.	*	

PRETRIAL ORDER

1.

There are no motions or other matters pending for consideration by the court except as noted:

- Plaintiffs' Motion for Reconsideration of Previously Filed Motion for Partial Summary Judgment and for Declaratory Judgment and Plaintiff's Motion to Strike, in Whole or in Part, the Report of Thomas Saving
- Plaintiffs' Motion to Strike Report of Thomas Saving

- Plaintiffs' Motion to Dismiss
- Plaintiffs' Motion in Limine (filed contemporaneously with this Pretrial Order)
- Defendant's Motion for Consideration of Previously filed Motion to Strike Plaintiffs' Expert Fred Kinder; Motion for Summary Judgment on Damages and Motion for Partial Summary Judgment – Statute of Limitations
- Defendant's Motion to Strike Plaintiffs' Expert (Docket No. 110).
- Defendant's Motion for Summary Judgment – Damages (Docket No. 113).
- Defendant's Motion in Limine (filed contemporaneously with this Pretrial Order).

2.

All discovery has been completed, unless otherwise noted, and the court will not consider any further motions to compel discovery. (Refer to LR 37.1B). Provided there is no resulting delay in readiness for trial, the parties shall, however, be permitted to take the depositions of any persons for the preservation of evidence and for use at trial.

None.

3.

Unless otherwise noted, the names of the parties as shown in the caption to this Order and the capacity in which they appear are correct and complete, and there is no question by any party as to the misjoinder or non-joinder of any parties.

No question.

4.

Unless otherwise noted, there is no question as to the jurisdiction of the court; jurisdiction is based upon the following code sections. (When there are multiple claims, list each claim and its jurisdictional basis separately.)

None.

5.

The following individually-named attorneys are hereby designated as lead counsel for the parties:

Plaintiff: James A. Pikl

Defendant: Billy M. Donley

Other Parties: (specify): none

6.

Normally, the Plaintiff is entitled to open and close arguments to the jury. (Refer to LR 39.3(B)(2)(b)). State below the reasons, if any, why the Plaintiff

should not be permitted to open arguments to the jury.

None.

7.

The captioned case shall be tried (XX) to a jury or ( ) to the court without a jury, or ( ) the right to trial by jury is disputed.

8.

State whether the parties request that the trial to a jury be bifurcated, i.e., that the same jury consider separately issues such as liability and damages. State briefly the reasons why trial should or should not be bifurcated.

No bifurcation requested.

9.

Attached hereto as Attachment "A" and made a part of this Order by reference are the questions which the parties request that the court propound to the jurors concerning their legal qualifications to serve.

Attached.

10.

Attached hereto as Attachment "B-1" are the general questions which Plaintiffs wish to be propounded to the jurors on voir dire examination.

Attached hereto as Attachment "B-2" are the general questions which Defendant wishes to be propounded to the jurors on voir dire examination.

Attached hereto as Attachment "B-3", "B-4" etc. are the general questions which the remaining parties, if any, wish to be propounded to the jurors on voir dire examination.

The court shall question the prospective jurors as to their address and occupation and as to the occupation of a spouse, if any. Counsel may be permitted to ask follow-up questions on these matters. It shall not, therefore, be necessary for counsel to submit questions regarding these matters. The determination of whether the judge or counsel will propound general voir dire questions is a matter of courtroom policy which shall be established by each judge.

11.

State any objections to Plaintiffs' voir dire questions: *See* attachment B-2.

State any objections to Defendant's voir dire questions: *See* attachement [sic] to B-1.

State any objections to the voir dire questions of the other parties, if any: N/A.

12.

All civil cases to be tried wholly or in part by jury shall be tried before a jury consisting of not less than six (6) members, unless the parties stipulate otherwise. The parties must state in the space provided below the basis for any requests for additional strikes. Unless otherwise directed herein, each side as a group will be allowed the number of peremptory challenges as provided by 28 U.S.C. § 1870. *See* Fed.R.Civ.P. 47(b).

N/A.

13.

State whether there is any pending related litigation. Describe briefly, including style and civil action number.

No. CV 02-0483526; Westgate Ford Truck Sales, Inc. v. Ford Motor Company; In the Court of Common Pleas, Cuyahoga County, Ohio. Putative class action lawsuit involving the alleged breach of paragraph 10 of Ford Sales and Service Agreement. The trial court granted Plaintiff's Motion for Class Certification on June 7, 2005, and certified a nationwide class identical to the one sought and denied in this case. The Plaintiffs in this case are members of the class that was certified in *West Gate*. Ford appealed the certification order on June 28, 2005.

14.

Attached hereto as Attachment "C" is Plaintiffs' outline of the case which includes a succinct factual summary of Plaintiffs cause of action and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law creating a specific legal duty relied upon by Plaintiff shall be listed under a separate heading. In negligence cases, each and every act of negligence relied upon shall be separately listed. For each item of damage claimed, Plaintiff shall separately provide the following information: (a) a brief description of the item claimed, for example, pain and suffering; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

15.

Attached hereto as Attachment "D" is the Defendant's outline of the case which includes a succinct factual summary of all general, special, and affirmative defenses relied upon and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law relied upon as creating a defense shall be listed under a separate heading. For any counterclaim, the Defendant shall separately provide the following information for each item of damage

claimed: (a) a brief description of the item claimed; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

16.

Attached hereto as Attachment "E" are the facts stipulated by the parties. No further evidence will be required as to the facts contained in the stipulation and the stipulation may be read into evidence at the beginning of the trial or at such other time as is appropriate in the trial of the case. It is the duty of counsel to cooperate fully with each other to identify all undisputed facts. A refusal to do so may result in the imposition of sanctions upon the non-cooperating counsel.

17.

The legal issues to be tried are as follows: Plaintiffs:

1. Did Ford sell comparable trucks to dealers at unpublished and/or unequal prices, in violation of the Sales and Service Agreements drafted by Ford Motor Company, causing damages to the Plaintiff dealers on those transactions where the Plaintiff dealer paid more for a truck than did a fellow Ford dealer?

2. Did Ford award greater discounts to some dealers than to the Plaintiff dealers, in violation of the Sales and Service Agreements drafted by Ford Motor Company, causing damages to the Plaintiff dealers on those transactions where the Plaintiff dealer was awarded a lesser discount than was a fellow Ford dealer?

3. Are overcharges (i.e., the differences in prices paid and/or discounts received by the Plaintiff dealers and other Ford dealers who paid less or who received greater discounts) the proper measure of damages in this case?

4. Does 49 CFR Part 565.3 provide the proper, legal definition of "comparable trucks" for purposes of this case?

5. Did Ford engage in conduct sufficient to invoke the doctrine of equitable tolling of the statute of limitations when it intentionally concealed from Plaintiffs the facts necessary to inform Plaintiffs that they had a cause of action for breach of contract, and repeatedly told Plaintiffs that the operation of the CPA program was legal and legitimate when in fact that program was illegal and illegitimate?

Plaintiffs do not agree with or acquiesce to Defendant's statement of the legal issues and believe they are not an appropriate compilation of the legal issues for trial.

Defendants:

1. Whether Plaintiffs' interpretation of the Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is reasonable?

2. Whether Ford's interpretation of the Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is reasonable?

3. Whether Plaintiffs' interpretation of paragraph 10 of Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is borne out by the course of dealing established between the parties for 14 years (for LJL) to 19 years (for Valley, Heintzelman, Peach State, and Bayshore)?

4. Whether Ford's interpretation of paragraph 10 of the Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is borne out by the course of dealing established between the parties for 14 years (for LJL) to 19 years (for Valley, Heintzelman, Peach State, and Bayshore)?

5. Whether, if Ford's interpretation of paragraph 10 is reasonable, the Ford Heavy-Duty Truck Sales and Service Agreements or Ford Truck Sales and Service Agreement at issue were modified by the mutual and consensual conduct of the parties to allow CPA to be given by Ford in its sole

discretion on a deal by deal basis in response to competition in specific transactions and in which the amount of the allowance given varied was not to be published or required to be published to any other dealer?

6. Whether Plaintiffs waived their breach of contract claim?

7. Whether Plaintiffs' breach of contract claim is barred by application of the doctrine of laches?

8. Whether Plaintiffs' breach of contract claim is barred by application of the doctrine of estoppel?

9. Whether Plaintiffs' claims for relief are barred, in whole or in part, by their failure to make timely application for any deposit, refund, allowance, or other payment or credit within twelve (12) months from the time each Plaintiff first became aware of their alleged eligibility as provided for in the applicable Terms of Sale Bulletins?

10. Whether the Plaintiffs' actions in their operation of the Appeal-Level CPA program constitute fraud or misrepresentation and, if so, whether such fraud or misrepresentation precludes Plaintiffs from recovering against Ford?

11. Whether Plaintiffs claims are barred, in whole or in part, because Plaintiffs failed to mitigate their damages?

12. Whether Mr. Fred Kinder is qualified to testify as an expert regarding Plaintiffs' alleged damages?

13. Whether Plaintiffs have laid a foundation for Mr. Kinder's report or purported Rule 1006 summary?

14. Whether Mr. Kinder's proffered testimony and purported Rule 1006 summary are admissible?

15. Whether Mr. Kinder's proffered testimony and purported Rule 1006 summary satisfy Fed. R. Evid. 402 and 403?

16. Whether, if Plaintiffs' interpretation of paragraph 10 is reasonable and if no defense Ford asserts is applicable, Defendant breached paragraph 10 of the Ford Heavy-Duty Truck Sales and Service Agreements or the Ford Truck Sales and Service Agreements at issue; and, if so, whether Plaintiffs were harmed by such breach, and, if so, in what amount?

17. Whether Plaintiffs' purported damage model is valid and based on a reasonable and reliable method for calculating damages under Plaintiffs' theory of the case?

18. Did Ford intentionally conceal from plaintiffs the nature, rules or procedures of the Appeal CPA program?

Defendants do not agree with or acquiesce to Plaintiffs' statement of the legal issues and believe

they are not an appropriate compilation of the legal issues for trial.

18.

Attached hereto as Attachment "F-1" for the Plaintiffs, Attachment "F-2" for the Defendant, and Attachment "F-3", etc. for all other parties is a list of all the witnesses and their addresses for each party. The list must designate the witnesses whom the party will have present at trial and those witnesses whom the party may have present at trial. Expert (any witness who might express an opinion under Rule 702), impeachment and rebuttal witnesses whose use as a witness can be reasonably anticipated must be included. Each party shall also attach to the list a reasonable specific summary of the expected testimony of each expert witness.

All of the other parties may rely upon a representation by a designated party that a witness will be present unless notice to the contrary is given ten (10) days prior to trial to allow the other party(s) to subpoena the witness or to obtain the witness' testimony by other means. Witnesses who are not included on the witness list (including expert, impeachment and rebuttal witnesses whose use should have been reasonably anticipated) will not be permitted to testify, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

Counsel for Plaintiffs and Defendant have discussed witnesses and have agreed to the following:

Plaintiffs have represented that the dealership principals and additional dealership witnesses, which would include Gerald Turnauer, Tom Reynolds, Tim Leskosky, John Drakesmith, Brian O'Donnell, Mike Owens, Ernie Bentley & Jim Kyle, will be called at trial. Plaintiffs have represented to counsel for Ford that if for any reason any of these witnesses are not called during Plaintiffs' case in chief, and Defendant Ford requests that they be available live in Ford's case in chief, Plaintiffs will make them available, upon reasonable notice.

Plaintiffs further indicated that expert witness Fred Kinder will be called, and again, if for some reason he is not called, Mr. Kinder will be made available live for Ford in Ford's case in chief, upon reasonable notice.

Plaintiffs have requested that Ford make available to Plaintiffs during Plaintiffs' case in chief the following Ford witnesses: Bill Royle, Charles O'Donnell, Jeanette Agnew and Ken Smith.

Ford's counsel has represented that Mr. Bill Royle will be made available live for Plaintiffs' case in chief, upon reasonable notice as to the date of appearance.

The parties have agreed that neither Ms. Jeanette Agnew nor Mr. Charles O'Donnell will appear live at trial. Therefore, the parties have agreed that any

deposition designations of their testimony must be provided to opposing counsel on or before Monday July 18, 2005, and that any counter designations must be provided on or before Monday, July 25, 2005. Ford's counsel has not determined at this point if Mr. Ken Smith will be brought to trial. As a result of that representation, Ford has agreed to notify Plaintiffs' counsel on or before July 25, 2005 in writing, whether Ford will bring Mr. Smith live to trial. If Ford determines that Mr. Smith will not testify live, then Plaintiffs shall have four (4) business days from the date of written notification to provide deposition designations with regard to Mr. Smith. Thereafter, Ford shall have a reasonable time to provide counter designations and/or objections.

As to Ford's witness Mr. John Fink, the parties agree that he will testify on August 15, 2005.

See Attachment "F-1" for Plaintiffs.

See Attachment "F-2" for Defendant.

19.

Attached hereto as Attachment "G-1" for the Plaintiffs; "G-2" for the Defendant., and "G-3", etc. for all other parties are the typed lists of all documentary and physical evidence that will be tendered at trial. Learned treatises which are expected to be used at trial shall not be admitted as exhibits. Counsel are required, however, to identify all such treatises under a separate heading on the party's exhibit list.

Each party's exhibits shall be numbered serially, beginning with 1, and without the inclusion of any alphabetical or numerical subparts. Adequate space must be left on the left margin of each party's exhibit list for court stamping purposes. A courtesy copy of each party's list must be submitted for use by the judge.

Prior to trial, counsel shall mark the exhibits as numbered on the attached lists by affixing numbered yellow stickers to Plaintiffs exhibits, numbered blue stickers to Defendant's exhibits, and numbered white stickers to joint exhibits. When there are multiple Plaintiffs or Defendants, the surname of the particular Plaintiff or Defendant shall be shown above the number on the stickers for that party's exhibits.

Specific objections to another party's exhibits must be typed on a separate page and must be attached to the exhibit list of the party against whom the objections are raised. Objections as to authenticity, privilege, competency, and, to the extent possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by the parties and shall be admitted at trial without further proof of authenticity.

Unless otherwise noted, copies rather than originals of documentary evidence may be used at trial. Documentary or physical exhibits may not be submitted by counsel after filing of the pretrial order, except upon consent of all the parties or permission of

the court. Exhibits so admitted must be numbered, inspected by counsel, and marked with stickers prior to trial.

Counsel shall familiarize themselves with all exhibits (and the numbering thereof) prior to trial. Counsel will not be afforded time during trial to examine exhibits that are or should have been listed.

20.

The following designated portions of the testimony of the persons listed below may be introduced by deposition:

Attached hereto as H-1/H-2.

Any objection to the depositions of the foregoing persons or to any questions or answers in the depositions shall be filed in writing no later than the day the case is first scheduled for trial. Objections not perfected in this manner will be deemed waived or abandoned. All depositions shall be reviewed by counsel and all extraneous and unnecessary matter, including non-essential colloquy of counsel, shall be deleted. Depositions, whether preserved by stenographic means or videotape, shall not go out with the jury.

As per paragraph 18 above, the parties are working through the availability of certain Ford witnesses for live testimony during Plaintiffs' case. Pursuant to those agreements, counsel for Ford has agreed to extend the time for Plaintiffs to designate

deposition testimony with regard to Ms. Jeanette Agnew, Mr. Charles O'Donnell and Mr. Ken Smith until Friday, July 15, 2005. Thereafter, Ford shall have a reasonable opportunity to provide counter designations and/or objections.

21.

Attached hereto as Attachments "I-1" for the Plaintiffs, "I-2" for the Defendant, and "I-3", etc. for other parties, are any trial briefs which counsel may wish to file containing citations to legal authority concerning evidentiary questions and any other legal issues which counsel anticipate will arise during the trial of the case. Limitations, if any, regarding the format and length of trial briefs is a matter of individual practice which shall be established by each judge.

Plaintiffs: Plaintiffs reserve the right to file trial briefs once the Court has made its rulings on the pending motions for partial summary judgment, motion to strike expert witnesses and other issues relative to the evidence to be presented in this case.

Defendants: See I-2.

22.

In the event this is a case designated for trial to the court with a jury, requests for charge must be submitted no later than 9:30 a.m. on the date on which the case is calendared (or specially set) for

trial. Requests which are not timely filed and which are not otherwise in compliance with LR 51.1, will not be considered. In addition, each party should attach to the requests to charge a short (not more than one (1) page) statement of that party's contentions, covering both claims and defenses, which the court may use in its charge to the jury.

Counsel are directed to refer to the latest edition of the Eleventh Circuit District Judges Association's Pattern Jury Instructions and Devitt and Blackmar's Federal Jury Practice and Instructions in preparing the requests to charge. For those issues not covered by the Pattern Instructions or Devitt and Blackmar, counsel are directed to extract the applicable legal principle (with minimum verbiage) from each cited authority.

23.

If counsel desire for the case to be submitted to the jury in a manner other than upon a general verdict, the form of submission agreed to by all counsel shall be shown in Attachment "K" to this Pretrial Order. If counsel cannot agree on a special form of submission, parties will propose their separate forms for the consideration of the court.

Plaintiffs: Plaintiffs desire for the case to be submitted to the jury upon a general verdict. Plaintiffs do not agree with the form of submission made by Ford. attached hereto as Attachment K-2. Plaintiffs object to K-2 as being improper, for many reasons,

among other things, that the verdict form is confusing, unwieldy, prejudicial, does not conform to the issues or evidence in the case and seeks to shift the burden of proof and persuasion solely on Plaintiffs, contrary to both the facts and legal issues of the case.

Defendants: See K-2 attached.

24.

Unless otherwise authorized by the court, arguments in all jury cases shall be limited to one-half hour for each side. Should any party desire any additional time for argument, the request should be noted (and explained) herein.

The parties request one-half (1/2) hour for the Plaintiffs and Defendant for opening argument and one-half (1/2) hour for the Plaintiffs and Defendant for closing arguments.

25.

If the case is designated for trial to the court without a jury, counsel are directed to submit proposed finding of fact and conclusions of law not later than the opening of trial.

N/A.

26.

Plaintiffs:

- During the course of this litigation, Plaintiffs' counsel, on behalf of Plaintiffs, have communicated in writing with Ford three separate offers of settlement. Ford, as of the date of the filing of this Pretrial Order, has not responded in writing to any of those offers. Furthermore, this Court suggested mediation between the parties and Ford refused to mediate.

- In addition, when this case was on appeal to the 11th Circuit, the 11th Circuit required Court mandated mediation. However, despite conversations between the mediator, counsel for Ford and counsel for Plaintiffs, counsel for Ford represented to the mediator that they had not even spoken with their client and had no authority for settlement.

- In the past month, Plaintiffs counsel have communicated a desire to mediate this case and again Ford has refused to mediate. Plaintiffs made an offer of settlement on June 27, 2005. However, on June 28, 2005, counsel for Plaintiffs and counsel for Ford met in person and discussed settlement and Ford made no offers of settlement at that time and there is no likelihood of settlement of the case at this time.

Defendant:

- The court communicated with counsel regarding settlement in a letter prior to granting Ford's motion for summary judgment on liability in May 2003.
- The parties mediated this case while on appeal from the district court's order granting Ford's Motion for Summary – Liability on February 2. 2004, but no settlement was reached.
- Plaintiffs' counsel submitted to defendant's counsel a settlement demand on or about June 27, 2005.
- Counsel met in person and discussed settlement on June 28, 2005.
- Plaintiffs' counsel submitted to Defendant's counsel a purported offer of judgment on or about June 29, 2005.
- There is no likelihood of settlement of the case at this time.

27.

Unless otherwise noted, the court will not consider this case for a special setting, and it will be scheduled by the clerk in accordance with the normal practice of the court.

The case is set for trial on August 8, 2005.

28.

The Plaintiffs estimate that it will require five (5) days to present their evidence. The Defendant estimates that it will require five (5) days to present its evidence. It is estimated that the total trial time is ten (10) days.

29.

IT IS HEREBY ORDERED that the above constitutes the pretrial order for the above captioned case (___) submitted by stipulation of the parties or (___) approved by the court after conference with the parties.

IT IS FURTHER ORDERED that the foregoing; including the attachments thereto, constitutes the pretrial order in the above case and that it supersedes the pleadings which are hereby amended to conform hereto and that this Pretrial Order shall not be amended except by Order of the court to prevent manifest injustice. Any attempt to reserve a right to amend or add to any part of the pretrial order after the pretrial order has been filed shall be invalid and of no effect and shall not be binding upon any party or the court, unless specifically authorized in writing by the court.

IT IS SO ORDERED this _____ day of _____, 20__.

_____
UNITED STATES DISTRICT JUDGE

Each of the undersigned counsel for the parties hereby consents to entry of the foregoing pretrial order, which has been prepared in accordance with the form pretrial order adopted by this court.

/s/ James A. Pikl
Counsel for Plaintiff

/s/ Billy M. Donley
Counsel for Defendant

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